IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9126 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

TRILOKESH @ JANAK RASIKLAL KADIA

Versus

COMMISSIONER OF POLICE

Appearance:

MS DR KACHHAVAH for Petitioner

Mr. U.R. Bhatt, AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 05/05/98

ORAL JUDGEMENT

By this application, the petitioner challenges the legality and validity of the order of detention dated 2nd December 1997 passed by the Police Commissioner for the city of Ahmedabad under Section 3(2) of the Gujarat Prevention of Anti-Social Activities Act (for short "the Act"), pursuant to which the petitioner is arrested and at present kept under detention.

2. The petitioner was considered to be the dangerous person by the society because he was carrying out

subversive and nefarious activities committing the offences in succession. He was dealing in liquor and being a bootlegger he was providing liquor to different agencies and persons. In order to carry out his such business smoothly he used to terrorise the people and put the people in fear of instant death or injuries. Because of his dread and terror, no one was complaining against him, but preferred to undergo the miseries and woes. The Police Commissioner, therefore, studied necessary records available in police stations and found that about two complaints were lodged against the petitioner, one with Kalupur police station and another with Prohibition police station. As alleged in both the complaints, the petitioner was found in possession of 346 and 161 bottles of liquor respectively without any pass or permit while carrying the same in Maruti car or by a scooter. It was also found that there were many incidents of such carriage of liquor leading to hooch tragedies and playing mischief with health of the people. It was decided to have some of the statements so as to know the truth going to the root of the case, but no one was willing to give statement because of the fear of violence. After considerable persuasion and that too when assurance was given that the particulars disclosing their identiity would be kept secret, some of the persons showed their willingness to give statements. Perusing the statements recorded, it was noticed that the petitioners and his compeers used to harass the people whenever they challenged his activities. He used to terrorise the people and those who refused to bend to his way were warned and brutally dealt with. Such subversive and nefarious activities i.e. anti-social activities were going berserk and immediate action to curb the same were absolutely necessary. After cogitation it was also found that any action if taken under the general law sounding dull would yield no result and would be a futile exercise. The only way out was to pass the order of detention and detain the petitioner. In the result, the impugned order came to be passed and at present the petitioner is kept under detention.

3. The order is challenged on several grounds and both submitted to pass the order favouring them, but when the query was made, the learned advocates representing the parties tapered off their submissions confining to the only point namely exercise of privilege under Section 9(2) of the Act. According to the petitioner, the privilege for not disclosing the particulars about the witnesses was not rightly exercised. For want of those particulars he was not able to point out how those statements were not reliable. No doubt, under Section

9(2) the authority has the privilege but the same could be exercised sparingly and in rare cases after satisfying fully that the fear expressed by the witnesses is genuine, honest and not imaginary or an empty excuse. As in this case, the right to make effective representation for want of particulars has been jeopardised, the order in question may be quashed holding that the detention is illegal.

4. In reply to such contention, Mr. U.R. Bhatt, the learned AGP submitted that reading the order it would appear that the Police Commissioner has considered all relevant factors. Before exercising the privilege general character, propensity, antecedents etc, were considered and keeping in mind the retaliatory tendency of the petitioner, the particulars about the witnesses were suppressed. When to protect the safety of the witnesses, the privilege was exercised, the order cannot be held bad.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-discosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or

fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference of a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujarat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the authority passing the detention order has to file the affidavit explaining in details how and under what circumstance the privilege exercised is just. In this case, no such affidavit is filed by the detaining authority. It should therefore be assumed that in fact there was no just cause to exercise the privilege and withhold the particulars. The petitioner was, therefore having a right to get those particulars for making effective representation. When those particulars are not given, his such right is jeopardised and therefore his continued detention must be held to be illegal. What appears from the copy of the order produced is that the Police Commissioner entrusted

the task of enquiry to the competent officer working under him. He then accepted the report may be because of the confidence he is having but he has as per the above referred decision, not considered the report qua the general background, character, antecedents, criminal tendency or propensity etc., of the detenu and such other matters as are relevant in the context of the informant. His subjective satisfaction is therefore vitiated. The order of detention therefore cannot be maintained as the privilege is not rightly exercised.

7. For the aforesaid reasons, the application is allowed. The order of detention dated 2nd December 1997 is hereby quashed and set aside. The petitioner is ordered to be set at liberty forthwith if not required in any other case. Rule accordingly made absolute.

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(rmr).